Supreme Court of the United Stat

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No.

FRANK BORDA, *Petitioner*

v.

UNITED STATES OF AMERICA, *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Frank Borda, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit, entered in the above case on January 4, 1961.

OPINION BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unreported. It is set forth in the Appendix to this Petition, *infra*, pages 1a-6a.

JURISDICTION

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on January 4, 1961. The jurisdiction of this Court is invoked under 28 U.S.C., Sec. 1254(1).

STATEMENT OF THE CASE

An indictment in the Trial Court for the Western District of South Carolina charged Petitioner, Frank Borda, with violation of Sec. 2312, Title 18, U.S.C. "Transportation of Stolen Vehicles".

Upon his plea of "Not Guilty" on October 7, 1958, the Petitioner was tried before a jury on May 4, 1960. At the conclusion of the evidence for the prosecution, the Petitioner moved for Judgment of Acquittal upon the grounds of failure to prove material allegations of the indictment. (Rec. Vol. II, P. 90.) The Court overruled the Petitioner's Motion. (Rec. Vol. II, P. 91).

The trial then proceeded and Petitioner introduced one Exhibit the entry of a plea of "Guilty" on behalf of Allen Frank Kayfield, after which the defense and prosecution rested.

At the conclusion of all of the evidence Petitioner renewed his Motion for Judgment of Acquittal upon the grounds of failure to prove the material allegations of the indictment. (Rec. Vol. II, P. 93). The case was submitted to the jury and on May 4, 1960, a Verdict of "Guilty as Charged" was returned.

On May 9, 1960, and within the time allowed by the Rules, Petitioner served a written "Renewal of Motion for Judgment of Acquittal and, in the Alternative,

Motion for New Trial", as will more fully appear by reference to the same which is printed in the Appendix attached hereto.

On June 24, 1960, this Motion came on for hearing before the Trial Court and both Motions were overruled. (Rec. Vol. II, Pages 119-144.) Judgment of Conviction was entered and a sentence of 3½ years in the custody of the Attorney General was imposed.

QUESTIONS PRESENTED

QUESTION I

Did Not the Trial Court Err in Refusing Petitioner's Motion for Judgment of Acquittal on the Grounds of Failure to Prove Material Allegations of the Indictment and Because of the Insufficiencies of the Evidence to Sustain a Conviction?

QUESTION II

Did Not the Trial Judge Err in Failing to Grant a New Trial Upon the Grounds of the Prejudicial Argument to the Jury by the District Attorney?

QUESTION III

Did Not the Trial Judge Erroneously Charge the Jury to the Prejudice of the Petitioner?

STATEMENT OF FACTS

The indictment in this cause returned in the United States District Court for the Western District of South Carolina (Spartanburg Division) charged the Petitioner with violation of Section 2312 Title 18, U.S.C. "Transportation of Stolen Vehicles".

The testimony at the trial disclosed that on or about November 30, 1957, Carl Faye Clary and Claude Lewis Solesbee were engaged in the used car business in the City of Spartanburg, South Carolina; that on or about November 30, 1957, Claude Lewis Solesbee received a

telephone call from Allen Frank Kayfield in the City of Spartanburg, South Carolina, and as a result thereof he and his companion in business, Carl Faye Clary, went to an eating place, known as "Simple Simon" in the City of Spartanburg, South Carolina, where they found Allen Frank Kayfield inside of the Simple Simon. (Rec. Vol. II, P. 41). A discussion then followed with reference to the sale of two automobiles, in which Kayfield, Borda, Solesbee, and Clary engaged. It later appeared that one of the automobiles had evidently been stolen. After the discussion between the four, Solesbee agreed to purchase two automobiles from Kayfield for a sum of $1,500.00 which he stated on the witness stand were worth in excess of $3,000.00. Solesbee and Clary both testified that insofar as they saw, the purchase price for the cars was paid by Solesbee to Kaysfield and that Borda received no part thereof. (Rec. Vol. II, Pages 46, 80). There is some discussion in the Record with reference to $300.00, but it is admitted by all parties concerned that this was an amount due Kayfield by Solesbee. (Rec. Vol. II, P. 80). Both Solesbee and Clary testified that they had never seen the Petitioner, Borda, before this meeting in Spartanburg. (Rec. Vol. II, Pages 43, 78). There is an absolute lack of testimony from any witness on behalf of the Government to connect Borda with the theft of the automobile in question, the transportation thereof, or aiding and abetting therein, or with any knowledge that the automobile in question had been stolen. In fact, there is no evidence to show that Borda even knew of the existence of the car in question until the meeting with Solesbee, Clary, and Kayfield at the Simple Simon, all of which will more fully appear by the Record and the Appendix herein.

The Petitioner made a Motion for Judgment of Acquittal, as will more fully appear by reference to the Record. (Rec. Vol. II, pages 90, 93).

The Petitioner was convicted as charged in the indictment and after timely Motions for a Judgment of Acquittal, or in the Alternative for a New Trial, the Presiding Judge overruled the same, whereupon he sentenced the Petitioner to serve 3½ years.

REASONS FOR GRANTING WRIT

QUESTION I

Did Not the Trial Court Err in Refusing Petitioner's Motion for Judgment of Acquittal on the Grounds of Failure to Prove Material Allegations of the Indictment and Because of the Insufficiencies of the Evidence to Sustain a Conviction?

Section 2312, Title 18 U.S.C., the one under which the Petitioner, Frank Borda, was indicted, provides:

> "Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000.00 or imprisoned not more than five years, or both."

No authority need be cited that this, being a criminal statute, must be strictly construed.

Section 2, Title 18 U.S.C., provides, as follows:

> "(a) Whoever commits an offense against the United States, or aids, abets, counsels, commands, induces, or procures its commission, is punishable as a principal."

It is the position of the Petitioner, Frank Borda, that even the most casual analysis of the evidence and testimony in this case clearly shows that there was in-

sufficient evidence to sustain a conviction and that therefore the Trial Judge erred in refusing Petitioner's Motion for Judgment of Acquittal and submitting the case to the jury.

In considering the insufficiency of the evidence particular attention is called to the failure of the government to establish that the Petitioner, Borda, actually transported the stolen Ford Station Wagon, or that he in any way aided or abetted its transportation, that he had at any time any knowledge of the fact that it was stolen, or that he was at any time in possession of the vehicle. Each of these material elements of the offense will be discussed separately for the purpose of clarity.

First of all, the government at no time contended that the Petitioner, Borda, had any part in the actual theft of the Ford Station Wagon. The record is void of any testimony or evidence that the Petitioner, Borda, had any actual knowledge that the automobile was stolen. There is no testimony that the Petitioner, Borda, ever drove the stolen automobile, or that he had ever ridden in its prior to the time that the automobile was in Spartanburg, South Carolina. There is no testimony that the Petitioner, Borda, came to Spartanburg in the company of Allen Frank Kayfield, that they had come here together or at the same time, or in any sort of joint undertaking. There is no testimony that the Petitioner, Borda, came here from Philadelphia, as Mr. Kayfield was said to have done. There is no evidence that the Petitioner, Borda, even knew of the existence of the Ford Station Wagon until the day at Simple Simon in Spartanburg, South Carolina. There is no testimony or evidence that there was any prearrangement or plan between the Petitioner, Borda, and anyone else involved, and no participation in aid-

ing and abetting in the transportation by the Petitioner, Borda, with anyone else involved. On the other hand, the government's own witnesses' testimony only shows that Kayfield, Solesbee, and Clary were part of any pre-arrangements or were the only participants in transportation or aiding and abetting in transporting. It is thus seen that the government failed to establishment the element of transporting or the abetting of such transporting. Nor can the government claim that this vital element of the offense can be supplied by an inference or assumption drawn from any guilty knowledge on the part of the Petitioner, Borda, that the automobile had been stolen.

There is no sufficient evidence in the record to charge the Petitioner, Borda, with knowledge of the fact that the Ford Station Wagon had been stolen.

It has been held in *Camilla* v. *United States* (C.A. 6 Ky. 1953), 207 F. (2d) 339, that where a defendant's fingerprints appeared on a car identified as stolen and transported in interstate commerce, and defendant admitted to having been in the company of his co-defendant on many occasions, there was no proof or evidence from which inferences could be drawn that the defendant knew that the automobile had been stolen. It was there held that the fact that defendant had been in the car sometime after it had been stolen, as had other people, and the further fact that defendant was also in the company of the co-defendant at various times during the same period, were not inconsistent with the defendant's innocence, since these facts showed nothing more than association with one guilty of a crime.

The only testimony linking the Petitioner, Borda, in any manner with the transaction between Kayfield and

Solesbee and Clary is the fact that he was present when the sale of the automobile was consummated and that he offered his comments concerning the price which Solesbee and Clary offered to pay for the automobile. However, it is the Petitioner's position in this case that even if guilty knowledge concerning the stolen automobile were imputed to Borda for the sake of argument, such knowledge is immaterial and irrelevant to conviction under this Section, unless coupled with some evidence that Borda transported the automobile or aided or abetted Mr. Kayfield in its transportation. The mere fact of guilty knowledge existing subsequent to the offense is insufficient to convict the Petitioner and shows, at the very most, nothing more than an association with one who is guilty of a crime.

That a person has knowledge that an automobile was stolen, which is denied in this case, is insufficient to convict him of any offense. It should be particularly noted, however, that even if Borda's comment concerning the price of the automobile could be held to establish knowledge of the theft of the car, such knowledge is not shown to have existed while the automobile was being transported in interstate commerce, but only afterwards at the Simple Simon in Spartanburg, South Carolina. An individual cannot be convicted of aiding and abetting an offense of which he had no knowledge until after it was complete. *Rizzo* v. *United States*, (C.C.A. Pa. 1921), 275 F. 51. This case overcomes any inference of aiding and abetting transportation which might arise from Petitioner having participated in any conversation about the price of the automobile. Then, if the government has failed to prove transportation, and has failed to prove that the Petitioner had any knowledge of the theft of the automobile, at least until

after the transportation, can the government supply this insufficiency of proof by resort to an inference arising from the possession by the Petitioner of the automobile shortly after it was stolen? Perhaps the government might urge such a proposition if it were a fact that the government had established possession by the Petitioner at any time.

The government did not offer sufficient testimony to establish that the Petitioner had possession of the automobile in question. The only attempt by the government to show anything like possession was the testimony of Clary and Solesbee that the Petitioner sat in the back of the automobile for a very few minutes, during a conversation between Kayfield, Solesbee, and Clary concerning the purchase and sale of the automobile. Of course, the government claims that Borda also commented upon this conversation, but that has no bearing whatsoever on possession. It has been held that the mere sitting in a vehicle is not sufficient evidence of possession. *United States* v. *O'Brien*, (7 Cir.), 174 F. (2) 341. Otherwise, under the government's theory, an equally strong case for possession could have been made against any person who may have associated with Mr. Kayfield, Clary, and Solesbee, or had sat in the car or been present at the time sale was consummated. In fact, under such a rule, any acquaintance of Mr. Kayfield, Solesbee, or Clary, who had been seen riding with either of them in the car could, for this reason alone, have been found guilty of the crime charged.

Possession connotes domination or a power or intent to control property and to exclude other persons from the exercise of authority over the property. It has not been shown that the Petitioner even had "custody" of

the automobile, and even custody is not tantamount to possession. In *Barfield* v. *United States*, 229 F. (2d) 936, it was held that much more must be shown than even the driving of a vehicle to establish the essential characteristics of possession. There was no effort on the part of the government to show even a momentary or apparent custody or control of the automobile in question. In this connection it has been held that the deficiency in proof of possession cannot be remedied on the theory that the Petitioner acquired a "possession" from aiding and abetting someone else's possession. *Johnson* v. *United States*, (8 Cir.), 195 F. (2d) 673. The *Johnson* case held that to be aiding and abetting possession, it must be knowing it to have been stolen. And assistance, assuming that to be so, cannot be turned into a vicarious possession to prove that as a fact on which to base the subsequent inference of knowledge.

The government presented no direct evidence to prove the offense against the Petitioner. The case was submitted to the jury upon a conglomeration of inferences, without directly proving any of the facts in issue. Certainly the testimony did not measure up to the requirements of circumstantial evidence in a criminal case. The rules as to circumstantial evidence are thus stated in I *Starkie on Evidence*, 570-574: "I. The circumstances from which the conclusion is drawn should be fully established. II. All the facts should be consistent with the hypothesis. III. The circumstances should be of a conclusive nature and tendency. IV. The circumstances should to a moral certainty actually exclude every hypothesis but the one proposed to be proved." These rules are approved in *State* v. *Aughtry* (1896), 26 S.E. 619; 49 S.C. 285. See also *State* v. *Hudson* (1903), 44 S.E. 968; 66 S.C. 394.

Of course, every circumstance must be proved beyond a reasonable doubt, and all of the circumstances proved must be consistent with each other and, taken together, point conclusively to the guilt of the accused to the exclusion of every other reasonable hypothesis. It is not sufficient that they create a probability, though a strong one; and if, assuming them to be true, they may be accounted for upon any reasonable hypothesis which does not include the guilt of the accused, the proof has failed. *State* v. *Kimbrell*, 4 S.E. (2d) 121; 191 S.C. 238. *State* v. *Brown*, 32 S.E. (2d) 825; 205 S.C. 514.

The circumstantial evidence presented by the government was insufficient by any standard to be submitted to the jury. Numerous hypothesis of innocense can be easily drawn from the testimony in the case. For example: Does the evidence exclude the hypothesis that Borda was a resident of Spartanburg, South Carolina; that he met Kayfield only a few hours before the meeting at Simple Simon with Solesbee and Clary; that Kayfield had, perhaps, talked to Borda about going back north with him and working with him, and that Borda had agreed to go? The testimony permits endless variations of this hypothesis.

It appears to the Petitioner that the government has proved its case in some such manner as the following: The element of transporting or the aiding or abetting of transporting is established from an inference from guilty knowledge on the part of the Petitioner concerning the theft of the car, which guilty knowledge is established from an inference drawn from the possession of the recently stolen automobile, which possession is established from an inference drawn from the fact

that the Petitioner sat in the back seat of the car in Spartanburg for a few minutes.

This, of course, violates the rule that where circumstantial evidence is relied on, the circumstances must themselves be proved and must not be presumed or rest in conjecture. *McCready* v. *Atlantic Coast Line Railroad Company*, 48 S.E. (2d) 193, 196; 212 S.C. 449. 32 C.J.S., Evidence, Sec. 1039, Pages 1099, *et seq.*

The Trial Judge was in error in allowing such testimony to go to the jury and in allowing the jury to bolster the weaknesses in the government's case by the application of any sort of presumption or inference to be drawn from the unexplained possession of a stolen vehicle. Certainly, possession by the Petitioner was never established by the government and the government should not have been allowed the aid of such a presumption in convicting the Petitioner. It seems very clear that this presumption or inference drawn from unexplained possession was the main theory upon which the Trial Judge submitted the case to the jury.

The following cases involving prosecutions under 18 U.S.C. 2312 (Transportation of Stolen Vehicles) illustrate that the courts will not approve convictions based on conjecture, suspicion and speculation as indulged in this case.

Camilla v. *U.S.*, 207 F. (2d) 339;
Johnson v. *U. S.*, 195 F. (2d) 673;
U. S. v. *Gardner*, 171 F. (2d) 753;
U. S. v. *Golden*, 166 F. Supp. 799;
Cox v. *U. S.*, 96 F. (2d) 41;
McCloud v. *U. S.*, 75 F. (2d) 576;
Abraham v. *U. S.*, 15 F. (2d) 911.

In the case of *Aikens, et al* v. *U. S.*, 98 U.S. App. D.C. 66, 232 F. (2d) 66, the Court held as to Appellant

Kingsbury that his mere association with Aikens and others found guilty is not sufficient to support his (Kingsbury's) conviction.

The cases of *U. S.* v. *Stromberg, et al* (2nd Cir.) 268 F. (2d) 256, and *Davis, et al* v. *U. S.*, 274 F. (2d) 585, 107 U.S. App. D.C. 76, also demonstrate the deficiency of the evidence against this Petitioner.

The Trial Judge did err in refusing Petitioner's Motion for Judgment of Acquittal on the grounds of failure to prove material allegations of the indictment and insufficient evidence to sustain a conviction.

QUESTION II

Did Not the Trial Judge Err in Failing to Grant a New Trial Upon the Grounds of the Prejudicial Argument to the Jury by the District Attorney?

The Petitioner contends that his rights to a fair and impartial trial were prejudiced by the United States Attorney in his argument, as a whole, and in the following particulars:

(1) Prejudicial error in his comments, indirectly, that the Petitioner did not testify.

(2) Prejudicial error in his appeal to passion and prejudice.

The duties and standards of conduct of United States Attorneys and Trial Judges, and authorities related thereto, came in for an exhaustive review by the United States Court of Appeals for the Fourth Circuit in the Opinion recently handed down in the case of *Wallace* v. *U. S.*, 281 F. (2d) 656, and while extensive research was conducted in the case at hand and some additional authority noted, the *Wallace* case contains ample authority for the views expressed herein.

In his opening argument to the jury (Rec. Vol. II, Page 26), the United States Attorney Hines commented indirectly on the fact that Petitioner had not taken the stand or testified.

> "Mr. Hines: If you forget every other thing I am telling you or will tell you, remember this: Mr. Borda went to Mr. Dever's room this morning in the hotel and here's what he said as I put it down. * * * But as I recall, here was what he said: he said that Mr. Borda told him to say that 'I gave'—that's Mr. Dever—'That I, Mr. Dever, gave Kayfield permission to take the car.' That hasn't been denied. * * *"

On direct examination, the United States Atttorney brought forth this information:

> "Mr. Hines: Who was present in your room this morning when he (Borda) came in there?
> Mr. Dever: A. My Wife."

With only the witness Dever, his wife, and the Petitioner, Borda, present, who was the only person to deny the statement—the Petitioner, Borda, if he had chosen to take the stand and testify. It cannot be assumed that the wife of witness Dever would have contradicted her husband.

In a case in which reversible error was noted because of comment on failure to deny or contradict testimony where defendants did not take the stand, the Court had this to say:

> "Everyone accused of crime is presumed to be innocent until proven guilty. During the period of that presumption, one so accused may combat the evidence brought against him; or he may, if he choose, meet it in silence. That is his right. For its protection the law imposes corresponding

silence upon prosecutor and court. Neither can validly refer or indirectly call attention to his failure to speak in his own defense. Being innocent in the eyes of the law, he is not called upon to meet accusing testimony by contradiction or explanation. Therefore, no presumption can lawfully be raised or comment lawfully be made upon his failure to do that which the law expressly says he shall not be required to do.

"The apprehension and arrest occurred at night, out in a stream. The only persons present were the three defendants and the two customs officers. The latter were witnesses for the prosecution. It follows, therefore, that the only persons who could possibly contradict their testimony were the defendants themselves." *Linden, et al v. United States* (C.C.A. 3rd, N.J., 1924), 296 Fed: 104.

"And, *except in those special cases where it appears that the accused himself is the only one who could possibly contradict the government's testimony*, ... the prosecutor may properly call attention to the fact that the testimony of the government witnesses has not been contradicted." (Emphasis added.) *Langford v. United States* (C.C.A. 9th, California, 1949), 178 F. (2d) 48.

The United States District Attorney aroused local passion and prejudice in his argument. (Rec. Vol. II, Pg. 26).

"Mr. Hines: * * * Now, Mr. Clary and Mr. Solesbee are our local people; both of them got on the stand and they told you exactly how it is, or how it was. * * *" (Rec. Vol. II, Pg. 26)

"Mr. Hines: * * * What was Borda down here for? What was he down here for? What was he down in our community for? You can look at him. He's got no business down here like that. But Kayfield. . . . * * *

"Mr. Watt: Your Honor, I don't think the District Attorney has the right to make that statement.

"Mr. Hines: You are right, I apologize.

"The Court: He says he withdraws that.

"Mr. Hines: Don't forget this one fact: Kayfield is from up there too."

In referring to the government's witness as "our local people" and to the Petitioner as not having any business being down in our community from "up there" the United States Attorney appealed to passion and prejudice which might have existed.

This error was not corrected by the Court in saying "He says he withdraws that." (Rec. Vol. II, Pg. 29).

At conclusion of United States Attorney's closing argument (Rec. Vol. II, Pg. 29):

"Mr. Hines: Is that what Borda is doing now? Borda says. 'No, sir, I was down here; I didn't have anything to do with; just down here for the buggy ride." * * *

"Is that an innocent man? Is he down here in our community with two cars—one a stolen car, a Ford stolen car. And he had nothing to do with it? Are you all going to swallow that kind of stuff? Personally, I don't think you will."

The Petitioner had not testified and had made no such statements attributed to him.

By unfairly injecting into the argument facts and statements not in the record, imposing upon the jury his personal opinion as to what the jury "will swallow", (Rec. Vol. II, Pg. 29) the United States Attorney is violating his impartial position as a quasi-judicial officer, in seeking to have the jurors draw unfavor-

able inferences as to the character of the Petitioner, Borda, which hasn't been placed in issue.

In one of a number of cases where the reversal resulted in part from the the probable impact upon the minds of the jurors of an improper argument by the District Attorney, the Court says:

> "A United States District Attorney carries a double burden. He owes an obligation to the government, just as an attorney owes an obligation to his client, to conduct his case zealously. But he must remember also that he is the representative of a government dedicated to fairness and equal justice to all and in this respect, he owes a heavy obligation to the accused. Such representation imposes an overriding obligation of fairness so important that Anglo-American criminal law rests on the foundation: better the guilty escape than the innocent suffer. In this case zeal outran fairness. The argument of the United States Attorney in the district court was improper, prejudicial, and constituted reversible error.
>
> "The Court's conclusion is directly related to the indecisiveness of the evidence supporting the verdict. In a close case, appeals to prejudice take on added weight. When the scales of justice may tip either way and a man's liberty lies in the balance, courts must be especially vigilant to protect an accused. It is necessary therefore to take a long, hard look at the record." *Handford* v. *United States* (C.A. 5, 1957), 249 Fed. (2d) 205, 296.

There as here the objectional argument was upon extraneous matters of a prejudicial nature.

Such improper actions of the prosecution have been condemned by this Court in *Grunewald, et al* v. *U. S.*, 353 U.S. 391. 1 L. Ed. 2d. 931, 77 S. Ct. 963; *Viereck* v.

U. S. 318 U.S. 236, 87 L. Ed. 734; *U S.* v. *Socony Vacuum Oil Co.*, 310 U.S. 150, 84 L. Ed. 1129; *Berger* v. *U. S.*, 295 U.S. 78, 79 L. Ed 1314 and *Wilson* v. *U. S.*, 149 U.S. 60, 37 L. Ed. 650

The Trial Judge did err in failing to grant a new trial upon the grounds of the Argument of the District Attorney being prejudicial to the right of the Petitioner. This action denied to the Petitioner the fair trial guaranteed under U. S. Constitution (5th and 14th Amendments).

QUESTION III

Did Not the Trial Judge Erroneously Charge the Jury to the Prejudice of the Petitioner?

It will be noted from a review of the Trial Court's Charge (Rec. Vol. II, p. 108) that undue emphasis was placed upon one particular element of the offense charged, that of transportation or the aiding and abetting of transportation. This emphasis misled the jury and caused it to discount the necessity of also finding that the Petitioner had knowledge that the automobile had been stolen. Taken word for word the Charge may have been technically correct, but taken as a whole and in connection with the highly prejudicial argument of the United States Attorney, the over-all result was to lead the jury to assume that the Petitioner's guilty knowledge had been established as a matter of law and that the only remaining issue to be decided by the jury was whether or not the Petitioner had in fact transported the stolen automobile or had aided in its transportation. When considered with the Government's argument, the instruction was not clear to the jury, that the mere fact of transportation, if established, was not a viola-

tion of the Statute without a further showing that Petitioner knew the automobile was stolen. Especially is this so, when taken with that portion of the Charge to the effect that knowledge through possession of recently stolen automobile is a presumption of law, shifting the burden of proof as to innocence onto the Petitioner. See *United States* v. *Rabb*, (Ill. 7th 1949), 177 F. (2d) 312; *Barfield* v. *United States*, (Ill. 5th, 1956), 229 F. (2d) 936.

It is felt that portions of the Trial Court's Charge constitute plain or prejudicial error and could be noticed by that Court (4th Cir.) under its own Rule 10(8) and under Rule 52 (b), Federal Rules of Criminal Procedure, especially where such notice is necessary to protect the life or liberty of a defendant.

At Rec. Vol. II, p. 109, the Trial Court committed error in its explanation of aiding and abetting by omitting any reference to knowledge.

> "The Court: Now, abet means to incite * * * that's what those terms mean. It means simply that if Borda, the Defendant in this case, aided, abetted, or helped, encourage, and countenanced this man in any particular in transporting this automobile, that he would be just as guilty as if he transported the automobile himself."

It is noted that the Trial Court refers to one who aids and abets as a "principal", whereas the Statute, Section 2, Title 18, U.S.C., now reads "is punishable as a 'principal' ".

At Rec. Vol. II, p. 110, the same error as mentioned above is again noted.

At the close of the Trial Court's Charge, at Rec. Vol. II, Pages 113-114, the last impression on the minds of the jurors was as follows:

> "The Court: After all, it resolves itself to a simple—applying the presumption of law of recently—possession of recently stolen automobile together with all the other law I have given you, after all is said and done, did the defendant here transport or aid and abet or help or assist in having that car brought from New Jersey to South Carolina? That's the only question. If he did, he's guilty; if he did not, he is not guilty."

The question of knowledge has previously been discussed in more detail under the question of insufficiency of the evidence.

We submit that the omission of knowledge in portions of the Trial Court's Charge, as an element of the offense was error and that the error was not cured or overcome by other portions of the charge. Section 2312, Title 18, is clear as to the elements of the offense and numerous decisions and authorities could be cited pointing out that all elements must be proved by the Government before a conviction can be sustained.

The deficiency of the Trial Court's Charge on the subject matter of knowledge is to be demonstrated by a consideration of the decision of this Court in *Screws* v. *U. S.*, 325 U.S. 91, 107, 89 L. Ed. 1495, 1505.

In the case of *Barry* v. *U. S.*, U.S.App.D.C. Nos. 15,763-15,765, January 12, 1961, the Court in reversing a conviction, discussing the aspect of "knowledge", stated as follows:

> "Failure to guide the jury in this respect may well have caused them to omit consideration of this branch of the case. We are not in a position to say,

in other words, that the verdict indicates that the jury found the evidence, bearing upon knowledge, established this essential element of the crime."

Petitioner would point out that to prevent injustice, in criminal cases, this Court has corrected fundamental errors even though the question or questions have not been properly saved.

See:

Wiborg v. *United States*, 163 U.S. 632, 41 L. Ed. 289, 16 S. Ct. 1127, 1197;
Crawford v. *United States*, 212 U.S. 183, 53 L. Ed. 465, 29 S. Ct. 260, 15 Ann. Cas. 392;
Burns v. *United States*, 274 U.S. 328, 71 L. Ed. 1077, 47 S. Ct. 650;
Berger v. *United States*, 295 U.S. 78, 79 L. Ed. 1314;
Screws v. *U. S.*, 325 U.S. 91, 89 L. Ed. 1495, 1505.

It is respectfully submitted that the errors urged in this Petition are basic and important.

There is, as to the questions presented, conflict between the United States Court of Appeals for the Fourth Circuit and the other Courts of the United States Circuits, and as well the pronouncements of this Honorable Court.

CONCLUSION

For the reasons above set forth, this Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

WILLIAM H. COLLINS
SAM R. WATT
Counsel for Petitioner

3 February 1961

APPENDIX

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 8163

UNITED STATES OF AMERICA, *Appellee,*

v.

FRANK BORDA, *Appellant.*

Appeal from the United States District Court for the Western District of South Carolina, at Spartanburg, Cecil C. Wyche, District Judge.

(Argued November 16, 1960. Decided January 4, 1961.)

Before SOPER and HAYNSWORTH, Circuit Judges and HARRY E. WATKINS, District Judge.

Sam R. Watt for Appellant, and Joseph E. Hines, United States Attorney, (James D. Jefferies, Assistant United States Attorney, on brief) for Appellee.

HAYNSWORTH, Circuit Judge:

On this appeal, the defendant, Frank Borda, convicted of a violation of the Dwyer Act,[1] contends the evidence was insufficient to support the verdict. We think the verdict is supported by the evidence, and we affirm denial of the motion for judgment of acquittal.

Chestnut Motor Company, of Philadelphia, furnished to one of its salesmen, Dever, a 1958 Ford station wagon. On the evening of November 29, 1957, Dever was driving this vehicle to his home in New Jersey when he ran out of gasoline. He left the station wagon parked on a side street and returned the next evening to find that it was gone.

On November 30, 1957, Carl Clary, a used car dealer of Spartanburg County, South Carolina, and John Solesbee,

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[1] 18 USCA § 2312.

who worked with, or for, Clary, went to a drive-in restaurant, in Spartanburg, in response to a telephone call to Solesbee from one, Allen F. Kayfield. Solesbee had been buying cars in the Philadelphia area and had dealt there with Kayfield, whose visit to Spartanburg was expected. When Clary and Solesbee arrived at the restaurant, they found the defendant, Borda, standing beside a 1958 Ford station wagon, which the proof has shown to be the same vehicle furnished for the use of Dever by his employer in Philadelphia, and which had been removed from the street some time after it was left there by Dever on the evening of November 29, Kayfield then come out of the restaurant and the four men entered the Ford station wagon, where they proceeded to negotiate for the sale of that vehicle and a 1957 Plymouth.

The testimony shows that the negotiations on behalf of the sellers were conducted, principally, by the defendant, Borda. He wanted $2,500 for the two automobiles. After some time, he declared he would not take less than $2,000 for the two, but finaly agreed to accept $1,500 in cash upon Clary's insistence that he had no more than that. During the discussion, however, Borda spoke angrily about the sum of $300 due by Solesbee to Kayfield in connection with a previous transaction. Borda conditioned the sale of the two vehicles upon a promise that the $300 sum would be paid "up there," on the following Monday.

$1,500 in cash was then delivered to Kayfield, who proceeded to make out bills of sale in his name. The defendant then suggested that they did not have the titles to the automobiles, and that they would postdate the bills of sale by four days.

When the transaction was concluded, Clary drove Borda and Kayfield to the airport.

Dever was called as a witness at the trial to establish ownership of the Ford stationwagon and the fact that it

was stolen. Among other things, he testified that on the evening preceding his testimony he had a general conversation with Borda in the lobby of a hotel in Spartanburg, where Borda and Dever were both stopping. Borda had visited the place of business of Dever's employer in Philadelphia and the two were acquainted. Dever testified that on the morning upon which he took the witness stand, Borda came by the room in the hotel occupied by Dever and Mrs. Dever. According to Dever, in this conversation Borda sought to persuade Dever to testify that Dever had given Kayfield permission to drive the station wagon. Borda claimed that he had seen Dever outside his apartment on the night of November 29, 1957, and that Dever was drunk. Dever admitted that he had had some drinks, but denied that he was drunk. He was then told by Borda to say that the had had ten drinks.

The only testimony offered on behalf of the defense was a record of Kayfield's conviction upon a plea of guilty to Dwyer Act charges based upon the transportation of the same Ford station wagon.

The defendant's contention is founded, principally, upon the Kayfield conviction. Borda reasons that that conviction establishes the fact that Kayfield effected the transportation of the station wagon knowing it to have been stolen, and that the testimony shows no connection between Borda and the vehicle, except a gratuitous assistance to his friend, Kayfield, in effecting a sale of it in Spartanburg. The testimony, however, clearly warrants broader inferences.

The Kayfield conviction, at the most, is evidence that Kayfield participated in the transportation with knowledge that the vehicle was stolen. There is nothing in the fact of that conviction which precludes the inference that Borda and Kayfield acted jointly, and the Borda as well as Kayfield participated in the transportation and with the same knowledge. Indeed, the testimony shows that Borda was

the chief negotiator, suggesting that he was the principal and Kayfield his accomplice. While the purchase price was immediately delivered into the hands of Kayfield and there is no testimony as to whether all or any part of this cash was actually transferred by Kayfield to Borda, it was Borda who agreed upon the purchase price and it was he who angrily insisted that Solesbee's pre-existing debt to Kayfield be settled promptly. Certainly, the jury was warranted in concluding that Borda's participation in the transaction was much more than that of an acquaintance of Kayfield's who simply happened upon the scene as Kayfield was about to negotiate the sale of vehicles which Kayfield had transported.

In considering the sufficiency of the evidence, we are required to take it in the light most favorable to the verdict.[2] Viewing the evidence in this light, we think it plain the jury was warranted in concluding that Borda exercised dominion over the station wagon and that its possession was not exclusively Kayfield's, but, at least in part, Borda's. The fact of possession in South Carolina of a vehicle so recently stolen in New Jersey would support an inference that the possessor was guilty of the theft and participated in the removal of the stolen goods.[3] Such inferences which may be drawn from proof of the bare fact of possession are further supported here by the testimony which places Borda in the Philadelphia area, where the theft was committed, and by the evidence that Borda made an effort to induce Dever to falsify his testimony, that he accepted a price which was substantially less than the testimony shows the real value of the automobiles to have been, and that he did not have titles to the vehicles. Borda's reliance upon cases in which the testimony was insufficient to establish

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[2] Glasser v. United States, 315 U.S. 60, 62 S. Ct. 457, 86 L. Ed. 680; Crawley v. United States, 4 Cir., 268 F. 2d 808; Bell v. United States, 4 Cir., 185 F. 2d 302.

[3] Battaglia v. United States, 4 Cir., 205 F. 2d 824.

the defendant's possession of the stolen goods is misplaced, for here the evidence, viewed as it now must be, establishes Borda's exercise of dominion and control over the vehicle.

We conclude the verdict is amply supported by the evidence, and that the motion for judgment of acquittal was properly denied.

Borda also complains of the Court's charge to the jury. Though the court clearly charged that knowledge that the vehicle was stolen was an essential element of the offense, the charge was concluded by a statement, in effect, that the only question for the jury was whether or not Borda transported the vehicle, or assisted or participated in its transportation. The complaint is that in the concluding paragraph of the charge there was no direct reference to the essential requirement of knowledge of the theft.

Viewed as a whole, the charge is correct. The fact that the elements of the offense were separately discussed could not have misled the jury. Perhaps it would have been better if the Court, in the concluding statement, had tied together all of the elements of the offense. It doubtless would have done so had the defendant made such a request at the time, or entered on objection to the charge that the element of knowledge had been insufficiently emphasized in the concluding portion of the charge. There was no such objection to the charge at the time, however, and this objection to a charge, which was correct when viewed as a whole, may not now be raised.[4]

Finally, the defendant complains of remarks by the prosecutor in his argument to the jury. These remarks related to collateral matters and we think were unprejudicial. We do not express approval of all the prosecutor had to say, or the manner in which it was said, but every slight excess does not require that a jury's verdict be overturned

[4] Rule 30, Federal Rules of Criminal Procedure.

and a new trial awarded. This is particularly true where the excess is called to the prosecutor's attention and he promptly confesses his error and apologizes, as the District Attorney did here after inviting the jury to look at the defendant with the apparent purpose of suggesting that his appearance proved that he had no legitimate purpose to serve in Spartanburg.

Principal objection is directed to the prosecutor's statement that there was no denial of Dever's testimony about his conversation in his hotel room with Borda. Borda's contention is that it amounted to a comment upon Borda's failure to testify in his own behalf, since the only persons present, according to Dever, were Dever, Borda and Mrs. Dever. He invokes the rule of Langford v. United States, 9 Cir., 178 F. 2d 48. Here, however, it is not apparent that Dever's testimony could be contradicted by no one other than the defendant. If the defendant did not go to Dever's hotel room and engage in a conversation with him, it is not unlikely that he could have produced witnesses to his presence elsewhere at the time Dever said he was in Dever's room. If Borda did go to Dever's room and engage in conversation with him, at least Mrs. Dever was present, and, presumably, would have testified truthfully to her recollection of the conversation had Borda wished to call her as a witness. In his charge to the jury the Court stated that the failure of the defendant to testify "can't be used against him," and that the jury "must not permit that fact to weigh in the slightest degree against him, the defendant, nor should this fact enter into the discussion or deliberation of the jury in any manner." We find no reason to suppose that the jury understood the prosecutor's remarks to be a direct reference to defendant's failure to testify.

We have examined the record and find no error affecting substantial rights of the defendant.

Affirmed.

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MAR 2 1961
JAMES R. BROWNING, Clerk

No. 691

In the Supreme Court of the United States

OCTOBER TERM, 1960

FRANK BORDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ARCHIBALD COX,
Solicitor General,

WILLIAM E. FOLEY,
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In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 694

FRANK BORDA, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-6a; R. III,[1] 4-11) is not yet reported.

JURISDICTION

The judgment of the court of appeals was entered on January 4, 1961 (R. III, 12). The petition for a writ of certiorari was filed on February 3, 1961. The

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[1] The record is in three volumes, referred to by their Roman numerals.

jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to support the petitioner's conviction for the interstate transportation of a motor vehicle known to have been stolen.

2. Whether remarks in the prosecutor's closing argument constituted prejudicial error.

3. Whether the court's charge to the jury covered the necessity of a finding that the petitioner had knowledge that the motor vehicle had been stolen.

STATUTE INVOLVED

18 U.S.C. 2312 provides:

> Whoever transports in interstate or foreign commerce a motor vehicle or aircraft, knowing the same to have been stolen, shall be fined not more than $5,000 or imprisoned not more than five years, or both.

STATEMENT

The petitioner was charged with the interstate ansportation of a stolen motor vehicle, which he new had been stolen, in violation of 18 U.S.C. 2312 R. I, 2). The jury found him guilty as charged (R. , 3), and he was sentenced to imprisonment for 3½ years (R. I, 7). On appeal (R. I, 8) the conviction was affirmed (R. III, 12).

1. A 1958 Ford station wagon assigned to Dever,

a salesman for Chestnut Motors, as a demonstrator (R. II, 4-5, 10, 14-15), was stolen after it had been parked in Collingswood, New Jersey, on the evening of November 29, 1957 (R. II, 5-6, 15-18, 28). Kayfield, another salesman for Chestnut Motors, had had dealings in Philadelphia with Solesbee, a buyer for Clary, a used car dealer, in Spartanburg, South Carolina (R. II, 25, 30, 42-43, 71-72).

On November 30, 1957, in Spartanburg, the petitioner and Kayfield negotiated with Clary and Solesbee for the sale of a Plymouth and the station wagon (identified as that assigned to Dever). The cars were in Spartanburg at the time (R. II, 32, 65-68). The petitioner, who did most of the negotiating for the sellers, stated that he wanted $2,500 for the two cars and would not take less than $2,000 (R. II, 32, 38, 40, 68).[2] He finally agreed to a price of $1,500 when Clary insisted that was all the money he had, the deal being conditioned upon a promise that $300 owed by Solesbee to Kayfield would be paid "up there" (in Philadelphia) on the following Monday (R. II, 32-33, 44-45, 68-69).

Cash in the amount of $1,500 was then paid to Kayfield who proceeded to make out the bill of sale. The petitioner stated that, since they did not have title to the cars, they would post-date the bill of sale by four days and Kayfield did so (R. II, 33, 38-39, 45, 46, 69). Clary then drove the petitioner and Kayfield to the airport (R. II, 34, 46). Dever had seen

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[2] Clary later sold the station wagon alone for $2,350, and testified that he valued the Plymouth at $1,300 (R. II, 40, 47).

the petitioner in Pennsylvania on two occasions prior to the loss of the car (R. II, 23-24).

Dever testified that, on the morning he took the witness stand, the petitioner came to his hotel room. In the presence of Mrs. Dever, the petitioner asked him to testify that he (Dever) had given Kayfield permission to take the station wagon (R. II, 22-23). Dever had not given such permission (R. II, 21).

The only defense evidence was a record of a prior plea of guilty by Kayfield for a violation of 18 U.S.C. 2312 in regard to the transportation of the same station wagon here involved (R. II, 91-92, 99).

2. During his closing argument the government attorney stated (R. II, 95):

> If you forget every other thing I am telling you or will tell you, remember this: Mr. Borda went to Mr. Dever's room this morning in the hotel and here's what he said as I put it down. * * * he said that Mr. Borda told him to say that "I gave"—that's Mr. Dever—"That I, Mr. Dever, gave Kayfield permission to take the car." That hasn't been denied. * * *

During the opening part of the closing argument the government attorney observed that Clary and Solesbee, although not angels, were local people who testified "how it was" (R. II, 94). In the closing half of his argument government counsel stated (R. II, 106-107):

> * * * What was Borda down here for? What was he down here for? What was he down in our community for? You can look at him. He's got no business down here like that. But Kayfield * * *

Mr. Watt [defense counsel]: Your Honor, I don't think the District Attorney has the right to make that statement.

Mr. Hines [government attorney]: You are right. I apologize.

The Court: He says he withdraws that.

Mr. Hines: * * * Kayfield came down here and * * * took his medicine * * *.

Is that what Borda is doing now? Borda says, "No, sir, I was down here; I didn't have anything to do with it. Just down here for the buggy ride." * * *

Is that an innocent man? Is he down here in our community with two cars—one stolen car, a Ford stolen car—and he had nothing to do with it? Are you going to swallow that kind of stuff? Personally, I just don't think you will.

3. In its final charge to the jury the court began with a statement that the petitioner was charged with the interstate transportation of the stolen Ford station wagon, and that "he then knew the said motor vehicle to have been stolen" (R. II, 108). After referring to the aider and abettor statute, the court continued (R. II, 109):

> Now, abet means to incite, encourage, instigate, countenance. * * * It means simply that if Borda, the defendant in this case aided, abetted, or helped, encouraged, and countenanced this man in any particular in transporting this automobile, that he would be just as guilty as if he transported the automobile himself.

Later in the charge, after referring to the principle that possession of a stolen vehicle in a state to which

it was recently transported from another state warrants the inference that the possessor participated in its interstate transportation in the absence of some explanation, the court stated (R. II, 110-112):

> In this case, there has been no testimony presented by the defendant to explain the defendant's possession. In connection, however, therewith, I charge you that the defendant has a right to sit silently and not take the witness stand. He has a right to stand on his Constitutional rights not to testify and it can't be used against him. He has exercised that right in this case and you can't use it against him. * * * The Supreme Court of the United States says that failure of the defendant to take the witness stand and testify in his own behalf does not create any presumption against him. "It must not permit that fact to weigh in the slightest degree against him, the defendant, nor should this fact enter into the discussion or deliberation of the jury in any manner."
>
> You can't presume he is guilty because he didn't take the witness stand. However, I continue about the other decisions of the Courts, which say this: "In prosecution for violation of this section—the one I have just read to you—knowledge that the automobile is stolen may be established by circumstances as well as by direct proof and the question is for you to determine whether he knew the car was stolen; whether he knew that it was; whether he aided or abetted in the transportation of it.
>
> "Possession by defendant of recently stolen automobile justifies the inference that possession is guilty possession and may be of controlling

> weight unless explained by circumstances or accounted for in some way consistent with innocence." That's the law, principle of law, you have to apply in deciding this case.

Later, in concluding the charge, the court stated (R. II, 113-114):

> After all, it resolves itself to a simple—applying the presumption of law of recently—possession of recently stolen automobile together with all the other law I have given you, after all is said and done, did the defendant here transport or aid and abet or help or assist in having that car brought from New Jersey to South Carolina? That's the only question. If he did, he's guilty; if he did not, he is not guilty.

ARGUMENT

1. Contrary to the petitioner's contention (Pet. 5-13), the evidence was sufficient to support the conviction.

The fact that the station wagon was stolen was undisputed. The jury could draw the inference as to the petitioner's knowledge of this from the evidence that he appeared in Spartanburg, South Carolina, on November 30, 1957, to negotiate the sale of the automobile stolen in New Jersey the day before; and that he agreed to accept, for the two automobiles for which neither he nor Kayfield had titles, a sum less than half the value of the cars. Cf. *United States* v. *Slaughter*, 255 F. 2d 770 (C.A. 7); *Melson* v. *United States*, 207 F. 2d 558 (C.A. 4). The petitioner's joint possession with Kayfield of the stolen station wagon was shown by the petitioner's predominant

role in the price negotiations.[3] His insistence that Solesbee make good the $300 debt to Kayfield as part of the complete transaction, his previous presence in Pennsylvania, and his departure with Kayfield indicated that the petitioner had come to South Carolina with Kayfield and was not a mere stranger who just happened to be in the neighborhood. The inference as to the petitioner's guilt is further supported by his attempt to persuade Dever to commit perjury and the petitioner's direction that Kayfield post-date the bill of sale.

Since the evidence was such that a jury might fairly conclude guilt beyond a reasonable doubt, the case was properly submitted to the jury. See *Holland* v. *United States*, 348 U.S.121, 139-140.

2. The parts of the government attorney's closing argument which the petitioner claims were prejudicially erroneous are set out in section 2 of the Statement, *supra*.

a. The prosecutor argued, without objection at the time, that it had not been denied that the petitioner attempted to persuade Dever to say that he had given Kayfield permission to use the station wagon. The petitioner invokes the rule that, since only he could have contradicted this testimony, it was improper for

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[3] The petitioner's leading part in the sale negotiations showing his possession of the automobile is in marked contrast to the type of cases he cites to the effect that mere association with a thief in an automobile is insufficient proof of guilt. See, *e.g.*, *Camilla* v. *United States*, 207 F. 2d 339 (C.A. 6); *United States* v. *O'Brien*, 174 F. 2d 341 (C.A. 7); *Johnson* v. *United States*, 195 F. 2d 673 (C.A. 8).

the prosecutor to comment that the government testimony had not been contradicted (Pet. 14-15). However, if the petitioner had not had this conversation at Dever's hotel room, it is possible that other witnesses could have contradicted Dever by testifying that the petitioner was elsewhere. Mrs. Dever, present at the time, also could have been called, and it cannot be presumed that she would testify falsely. Accordingly, the testimony, if untrue, could have been denied by witnesses other than the petitioner. It is highly unlikely, moreover, that the jury considered the prosecutor's remarks as a direct reference to the petitioner's failure to testify, in view of the repeated admonitions in the final charge that such failure "can't be used against him", and that the jury "must not permit that fact to weigh in the slightest degree against him, the defendant, nor should this fact enter into the discussion or deliberation of the jury in any manner" (R. II, 111).

b. There was no prejudicial appeal (see Pet. 15-16) when the prosecutor referred in the opening part of his argument to government witnesses Clary and Solesbee as "our local people" (R. II, 94), and then much later in the closing half, stated that the petitioner had no business "down in our community" (R. II, 106). It is not likely that the jury got the impression that the local witnesses were good citizens as opposed to the petitioner as a bad outsider from a northern city, since the prosecutor himself stated the local witnesses were not angels (R. II, 94), and defense counsel spoke disparagingly of them (R. II, 101). In any event, after objection, the court in ef-

fect sustained it by accepting the prosecutor's withdrawal of the challenged remarks (R. II, 106). Defense counsel was apparently satisfied with this disposition, and did not ask for a mistrial.

c. The petitioner complains (Pet. 16) that, even though he had not testified and had not made the statement attributed to him, the prosecutor improperly argued that the petitioner said, "No, sir, I was down here; I didn't have anything to do with it. Just down here for the buggy ride" (R. II, 107). This was not presented to the jury, however, as a direct quotation but as the substance of the defense presented by the petitioner's counsel. It was not prejudicial, nor objected to, and essentially a repetition by the prosecutor of defense counsel's prior argument that Kayfield, not the petitioner, had driven the stolen car (R. II, 100, 98) and that the only thing proved against the petitioner was that he had argued about the money (R. II, 101).

3. There is no merit to the petitioner's contention that the court's final charge to the jury (see Statement, *supra*, pp. 5-7) was erroneous in not requiring a finding as to the petitioner's knowledge that the station wagon had been stolen (Pet. 18-21). The court's charge must be read in its entirety, *Boyd* v. *United States*, 271 U.S. 104, 107. When so read it is clear that the jury was required to find that the petitioner knew the car was stolen before a conviction could result. The charge began with the statement that the petitioner was charged with interstate transportation of the stolen station wagon and that "he then knew the said motor vehicle to have been sto-

len" (R. II, 108). Later the court stated that "knowledge that the automobile is stolen may be established by circumstances as well as by direct proof and the question is for you to determine whether he knew the car was stolen; whether he knew that it was; whether he aided or abetted in the transportation of it" (R. II, 111). In view of these references to the petitioner's knowledge, it was not necessary to repeat these in other parts of the charge.

Moreover since no objection was made on this point at the time the charge was given, the petitioner's argument comes too late on appeal. Rule 30, F. R. Crim. P.; *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 238-239; *Harris* v. *United States*, 359 U.S. 19, 21.

CONCLUSION

For the reasons stated it is respectfully submitted that the petition for a writ of certiorari should be denied.

ARCHIBALD COX,
Solicitor General.

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BEATRICE ROSENBERG,
ROBERT G. MAYSACK,
Attorneys.

MARCH 1961.

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